Case Nos. 05-35569 and 05-35570

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION, et al.,
Plaintiffs-Appellees,
v.
NATIONAL MARINE FISHERIES SERVICE, et al.,
Defendants-Appellants,
And
FRANKLIN COUNTY FARM BUREAU FEDERATION, et al.,
Defendant-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF OF *AMICUS CURIAE* STATE OF NEBRASKA IN SUPPORT OF THE FEDERAL DEFENDANTS' AND THE BPA CUSTOMER GROUP'S APPEALS TO REVERSE THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT

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I. INTRODUCTION AND SUMMARY OF POSITION.

Pursuant to FED. R. APP. P. 29(a), the State of Nebraska ("Nebraska") offers this brief *amicus curiae* in support of the Federal Defendants' and the BPA Customer Group's appeals to reverse the preliminary injunction issued by the district court. Nebraska wants to impress upon the Court the national significance of the issues decided by the Honorable Judge Redden in his May 26, 2005 Order (the "Merits Order"). Nebraska respectfully requests that this Court refrain from reaching prematurely a decision on that Order in the context of the instant appeal. This appeal is limited to the propriety of Judge Redden's June 10, 2005 Injunctive Order (the "Injunction").[1] The Injunction should be reversed because it constitutes an abuse of the district court's discretion.

If the Court considers the Merits Order, Nebraska's brief will assist the Court by providing important background regarding the Missouri River litigation Judge Redden reviewed when holding unlawful NOAA Fisheries' application of 50 C.F.R. § 402.03 and that agency's formulation of the "environmental baseline" in this case. Nebraska respectfully suggests Judge Redden's reliance on two district court opinions issued in the context of that litigation was inappropriate. As discussed herein, conclusions reached by those lower courts are pending before the

[1] *See National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1278878 (D. Or. May 26, 2005) and *National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1398223 (D. Or. June 10, 2005).

Eighth Circuit Court of Appeals. A ruling from that Court is imminent, and certain principles on which Judge Redden relied may – and Nebraska believes will – be overturned.

As further explained herein, and consistent with Nebraska's (and the Nebraska Public Power District's) arguments to the Eighth Circuit, NOAA Fisheries correctly included the effects of past and ongoing, non-discretionary actions in the "environmental baseline" because such formulation is consistent with the regulatory definition of that term. *See* 50 C.F.R. § 402.02 (definition of "Effects of the action"). NOAA Fisheries also correctly applied 50 C.F.R. § 402.03 ("Applicability") in this case, which excludes non-discretionary actions from application of Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536.

II. NEBRASKA'S INTEREST IN THE ISSUES PRESENTED.

As in the Columbia Basin, significant infrastructure developed around and depends on managed river flows provided by the system of dams and reservoirs operated by the U.S. Army Corps of Engineers ("Corps") on the Missouri River. Nebraska historically benefited more than any other state in the Missouri River Basin from the Corps' operations. *See generally* National Academy Press, *The Missouri River Ecosystem: Exploring The Prospects For Recovery* (2002). In 1994, the Missouri Basin derived $571.6 million in annual water supply benefits

by withdrawing water from the River. *Id.* at 93. Nebraska receives 44.8% of that total, or approximately $256 million annually in 1994 dollars. *Id.* at 94. These benefits accrue at intakes for thermal power plants and at municipal, irrigation, commercial and industrial, domestic, and public water intakes. *Id.* at 93. Hydropower benefits have an annualized value of $615 million, of which Nebraska receives 27.3%, or approximately $168 million. *Id.* at 97. Most impressive is the $18 billion in total flood damage prevented by the Corps' dam and reservoir operations as of 1998. Nebraska receives 18.7%, or over $77 million, of an annualized $414 million in flood control benefits. *Id.* at 99-100.

The Corps manages the Missouri River dams and reservoirs pursuant to the Flood Control Act of 1944, 58 Stat. 887 (1944) ("FCA") and other authorities. Under the FCA, the dominant functions of the Missouri River dams and reservoirs are flood control and navigation. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019-1020 (8th Cir. 2003), *cert. denied North Dakota v. Ubbelohde*, 124 S.Ct. 2015 (2004), *citing ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512 (1988). Nebraska has relied on the Corps' recognition of these dominant functions for over six decades.

Like the Columbia River Basin, the Missouri River Basin has been embroiled in litigation for many years.[2] The most recent litigation is pending in the Eighth Circuit Court of Appeals.[3] The subject of those appeals includes a biological opinion and its subsequent amendment issued by the U.S. Fish and Wildlife Service ("Service") regarding the Corps' operation of the Missouri River dams and reservoirs.[4]

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[2] *See, e.g., South Dakota v. Ubbelohde*, No. 02-3011 (D.S.D.); *North Dakota v. Ubbelohde*, No. 02-59 (D.N.D.); *Montana v. Ubbelohde*, No. 02-70 (D. Mont.); *Nebraska v. Ubbelohde*, No. 02-217 (D. Neb.); *Lower Brule Sioux v. Rumsfeld*, No. 02-3014 (D.S.D.); *American Rivers v. U.S. Army Corps of Eng'rs*, No. 03-241 (D.D.C.); *Blaske Marine, Inc. et al. v. Norton*, No. 03-142 (D. Neb.); *North Dakota v. U.S. Army Corps of Eng'rs*, No. 28-03-C-43; *Ubbelohde*, 330 F.3d at 1020.

[3] *See American Rivers v. U.S. Army Corps*, Appeal No. 04-2737 (8th Cir.); *State of Nebraska v. U.S. Army Corps*, Appeal No. 04-2774 (8th Cir.); *Nebraska Public Power District v. U.S. Army Corps*, Appeal No. 04-2785 (8th Cir.); *State of Missouri v. U.S. Army Corps*, Appeal No. 04-2794 (8th Cir.); *Mandan, Hidatsa v. U.S. Army Corps*, Appeal No. 04-2878 (8th Cir.); *Blaske Marine v. U.S. Army Corps*, Appeal No. 04-2994 (8th Cir.). These cases were consolidated for briefing and argument by the Eighth Circuit. The consolidated appeals are herein referenced as the "*MoRiver Appeals*."

[4] Biological Opinion on the Operation of the Missouri River Mainstem Reservoir System, Operation and Maintenance of the Missouri River Bank Stabilization and Navigation Project, and Operation of the Kansas River Reservoir System (November 2000); 2003 Amendment to the Biological Opinion on the Operation of the Missouri River Mainstem Reservoir System, Operation and Maintenance of the Missouri River Bank Stabilization and Navigation Project, and Operation of the Kansas River Reservoir System (December 2003).

In formulating its biological opinion, the Service failed to apply properly the regulatory definition of "environmental baseline" and failed to recognize the application of 50 C.F.R. § 402.03, which excludes non-discretionary actions from Section 7 of the ESA. As a result of those errors, the Service formulated a reasonable and prudent alternative that interferes with the Corps' pre-existing mandates under the FCA, as interpreted by both the Eighth Circuit and the Supreme Court. The Service's misapplication of the ESA has created a dramatic conflict in the Missouri River Basin. Nebraska and the Nebraska Public Power District argued to the Eighth Circuit that the Service misapplied the ESA and its implementing regulations and have asked that Court to so rule.

The Service's actions in the Missouri River Basin are at odds with the actions of NOAA Fisheries in the case before Judge Redden. NOAA Fisheries properly applied 50 C.F.R. § 402.03 and included certain past and ongoing, non-discretionary operations in its formulation of the environmental baseline when developing the Federal Columbia River Power System biological opinion ("FCRPS BiOp") at issue below. The Nebraska Public Power District, in fact, directed the Eighth Circuit to the FCRPS BiOp as an example of how the ESA should be applied in the context of large river systems characterized by dams and reservoirs constructed and operated long before the ESA was enacted. Plaintiff-Appellant Nebraska Public Power District's Reply Brief at 12-16, *MoRiver Appeals.*

Nebraska believes that NOAA Fisheries' interpretation of the ESA and its implementing regulations properly reconciled the competing obligations of federal water management agencies. If that interpretation is struck down, the conflict in the Missouri Basin will manifest itself nationwide.

A decision from the Eighth Circuit Court of Appeals on the interrelationship between the ESA and the Corps' pre-ESA congressional mandates is imminent. Briefing in the Missouri River appeals closed February 18, 2005, and the appeals were argued on April 11, 2005. The Eighth Circuit's *Ubbelohde* opinion was issued three months after argument, and it is reasonable to expect that the Eighth Circuit will rule this summer on the same basic issues Judge Redden addressed in the Merits Order, namely, whether it is proper to distinguish between discretionary and non-discretionary elements of a proposed action for purposes of Section 7 consultation and whether ongoing, non-discretionary actions are properly considered part of the "environmental baseline" during such consultations.[5]

In contrast to the instant appeal, which arises in the context of expedited briefing on a preliminary injunction, the issues before the Eighth Circuit have been fully briefed and argued ***on the merits***. This Court should limit its instant ruling to

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[5] *Compare* Merits Order, 2005 WL 1278878 at *7, where Judge Redden determined that NOAA Fisheries violated ESA Section 7 in the following respects: "(1) the improper segregation of the elements of the proposed action NOAA deems to be nondiscretionary; [and] 2) the comparison, rather than the aggregation, of the effects of the proposed action; ... ."

the sole issue properly before the Court - the validity of the Injunction. A premature decision by this Court regarding the application of 50 C.F.R. § 402.03 and the "environmental baseline" concept may disrupt operations of river systems across the nation, including the Missouri River system. Absent briefing and argument on the merits, this Court should refrain from deciding issues with such far-reaching implications.

III. THE ONLY ISSUE PROPERLY BEFORE THIS COURT IS THE VALIDITY OF THE INJUNCTION, WHICH SHOULD BE REVERSED AS AN ABUSE OF DISCRETION.

Judge Redden explained that the Merits Order "is not a final order as to all claims and all parties for purposes of FED. R. CIV. P. 54(b)." 2005 WL 1278878 at *22. Judge Redden expressly retained jurisdiction over the issues presented in the Merits Order. *Id.; see also Estate of Conners v. O'Conner*, 6 F.3d 656, 658 (9th Cir. 1993); *United States v. Pitner*, 307 F.3d 1178, 1183, n.5 (9th Cir. 2002) ("during an interlocutory appeal, the district court retains jurisdiction to address aspects of the case that are not the subject of the appeal"). Stated alternatively, this Court lacks jurisdiction to decide issues arising from the Merits Order. *National Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1167 (9th Cir. 2003) ("[W]e conclude that, absent a Rule 54(b) certification, the listing decision, in the circumstances of this case, is not a final judgment."); *compare Alsea Valley*

Alliance v. Dep't of Commerce, 358 F.3d 1181 (9th Cir. 2004).[6] Thus, the only issue properly before the Court is the propriety of the Injunction.

In reviewing a preliminary injunction, this Court must determine if the district court abused its discretion or based its decision on an erroneous legal standard or on a clearly erroneous finding of fact. *Harris v. Bd. of Supervisors of Los Angeles County*, 366 F.3d 754, 760 (9th Cir. 2004). Judge Redden abused the discretion vested in him under the relevant provision of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A).[7] That provision vests district courts with authority to vacate and set aside agency actions found arbitrary, capricious or otherwise not in accordance with law. *Id.* Neither Section 706(2)(A), nor any other provision of the APA, authorizes district courts to seize control of the dams and reservoirs on the Nation's rivers to dictate water management agencies' day-to-day operational decisions where, as here, those agencies have made a good faith effort to comply with the ESA. *Compare Wyoming v. U.S. Dep't of Interior*, 360 F. Supp. 2d 1214, 1244 (D. Wyo. 2005)

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[6] In *Alsea Valley Alliance*, the Court concluded that an order remanding a rule to the agency was not a final appealable order. *See also Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). In this case, Judge Redden has not even reached the point of remand. *See* 2005 WL 1398223 at *5 (reserving right to address remand at September 7, 2005 status conference).

[7] While Plaintiff-Appellees' case is based on alleged violations of the ESA, the standard of review is provided by 5 U.S.C. § 706(2)(A). *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) (biological opinions reviewable under APA).

("This Court is not in the position to step into the shoes of the Secretary of the Interior and begin administering the [ESA]. Nor is this Court in a position to micro-manage the [Service's] authority to manage the gray wolf population. This Court does not represent either the legislative or executive powers, and therefore cannot in good faith craft the type of relief prayed for by the Plaintiffs and the Plaintiff-Invervenors."); *Kentucky Heartwood, Inc. v. Worthington*, 125 F. Supp. 2d 839 (E.D. Ky. 2000) ("The Court has neither the responsibility nor the desire to micro-manage the Daniel Boone National Forest."); *N.R.D.C. v. Fox*, 93 F. Supp. 2d 531 (S.D.N.Y. 2000) *affirmed in part, vacated in part, N.R.D.C. v. Muszynsk*, 268 F.3d 91 (2d Cir. 2001) (APA "does not contemplate" prospective micro-management as a remedy.). Nor are district courts authorized under the APA to substitute their judgment for that of NOAA Fisheries on matters of biology and science, in which the district courts lack adequate expertise.

The Supreme Court recently explained that, even under APA Section 706(1), 5 U.S.C. § 706(1), which allows district courts to compel agency action unlawfully withheld, courts are not to micro-manage agency decisions. *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004) ("*SUWA*"). The Court in *SUWA*[8] found such "pervasive oversight by federal courts" to be unacceptable:

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[8] Although *SUWA* arose under Section 706(1), the general principles set forth therein are equally applicable, if not more so, to actions arising under Section 706(2) of the APA.

> The principal purpose of the APA limitations [preventing a court from directing an agency to act in a particular manner] is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

SUWA, 124 S.Ct. at 2381.

Judge Redden's assessment that drastic affirmative relief is compelled somehow by the ESA in this instance is incorrect. 2005 WL 1398223 at *4. This is ***not*** a case involving a violation of the procedural requirements of the ESA. *Contrast Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Here, the Federal Defendants specifically met the consultation requirements imposed by Section 7 of the ESA. *Compare Pyramid Lake Paiute Tribe of Indians v. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). The district court's conclusion that a substantive violation of the ESA is likely to follow unless the Injunction is enforced is without foundation and, in fact, contrary to NOAA Fisheries' scientific conclusions. Moreover, the affirmative relief ordered by Judge Redden is more likely to harm the species at issue than the actions proposed by the Federal Defendants in the FCRPS BiOp. *See* Emergency Motion Under Circuit Rule 27-3

of the Federal Appellants for a Stay Pending Appeal (filed June 15, 2005) at 14-20 and supporting Declarations.

In sum, the district court abused its discretion and exceeded its powers under the APA by ordering the agencies to operate the FCRPS in a manner the district court believes is best suited to support the biological needs of the Columbia River species. The proper remedy under the APA in this case is vacatur and remand of the FCRPS BiOp to NOAA Fisheries for further action. The Injunction should be reversed.

IV. JUDGE REDDEN'S RELIANCE ON THE MISSOURI RIVER CASES WAS MISPLACED.

This Court need not and should not reach the Merits Order in this appeal for the reasons explained above. In reviewing the parties' emergency stay motions and in conferring with counsel regarding the appeal, however, it appears certain parties will attempt to justify the Injunction based on the content of the Merits Order or challenge the Injunction based on deficiencies in the Merits Order. To the extent this Court reviews the Merits Order, Nebraska believes that the Court would benefit from additional background on two decisions relied on by Judge Redden, *American Rivers v. U. S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230 (D.D.C. 2003), and *In re: Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (D. Minn. 2004). *See* Merits Order, 2005 WL 1278878 at *9-10. Those decisions arose from litigation in which Nebraska has participated for many years

and which involves issues nearly identical to those addressed in the Merits Order.

The current Missouri River litigation arose out of "the prolonged drought conditions that the Missouri River has been experiencing over the last several years." *Ubbelohde*, 330 F.3d at 1020. The litigation began primarily as a conflict between upstream and downstream states. In 2003, the Eighth Circuit agreed with Nebraska that the Corps' discretion was constrained by the FCA and the Corps' Missouri River Master Manual, which governed dam and reservoir operations. The Court affirmed the injunction obtained by Nebraska requiring the Corps to release water to support downstream uses. 330 F.3d at 1027. The interrelationship between the FCA and the ESA, however, was not presented to the Court in *Ubbelohde*.

In early 2003, environmental plaintiffs sought an injunction from the Federal District Court for the District of Columbia requiring the Corps to operate the Missouri River dams in accordance with a biological opinion issued by the Service. *American Rivers supra*. District Judge Gladys Kessler granted the injunction, requiring the Corps to reduce river flows below minimum navigation service requirements during the heart of the navigation season. The relief ordered by Judge Kessler would have precluded the Corps from meeting its statutory obligations under the FCA. Nebraska submits that Judge Kessler's opinion was based on the fundamentally flawed premise that a Federal agency must consult on

the effects of its non-discretionary duties simply because the agency proposes a new discretionary action. 271 F. Supp. 2d at 251.

Nebraska did not have an opportunity to brief the issue before the D.C. Circuit Court of Appeals, however, because shortly after Judge Kessler granted her injunction, the Judicial Panel on Multidistrict Litigation granted Nebraska's earlier filed motion to transfer six pending Missouri River cases, including *American Rivers*, to a single district court for resolution. *In re: Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003). The cases were transferred to District Judge Paul Magnuson in the District of Minnesota, who refused to enforce Judge Kessler's injunction.

During the latter part of 2003 and the spring of 2004, the parties briefed the merits of the Service's interpretation of the ESA as it applies to the Corps' Missouri River operations. Judge Magnuson issued his opinion in June 2004. In contrast to Judge Kessler, Judge Magnuson did ***not*** hold that the Corps' non-discretionary operations are subject to Section 7. To the contrary, Judge Magnuson recognized that only discretionary actions are subject to Section 7, but specifically found that all of the Corps' Missouri River operations are discretionary. *In re: Operation of the Missouri River*, 363 F. Supp. 2d at 1153. Judge Magnuson's conclusion in this regard is one of the primary issues currently on appeal before the Eighth Circuit.

Judge Redden relied on *American Rivers* to support the errant proposition that the existence of some amount of discretion in a proposed action subjects even non-discretionary duties connected to that action to Section 7's substantive mandates. Merits Order, 2005 WL 1278878 at *9. Setting aside the fact that the preliminary conclusions expressed in *American Rivers* were superseded by Judge Magnuson's subsequent order on the merits, the proposition adopted by Judge Kessler (and later Judge Redden) is contrary to the ruling of every Circuit Court that has considered the matter, including this Court. As this Court has consistently recognized, "where there is no agency discretion to act, the ESA does not apply." *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-1126 (9th Cir. 1998); *see also Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004); *Turtle Island Restoration Network v. NOAA*, 340 F.3d 969, 974 (9th Cir. 2003); *Environmental Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001). *Cf. American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) (holding the ESA is not a "font of new authority" but rather "a directive to agencies to channel their ***existing*** authority in a particular direction") (emphasis original); *Platte River Whooping Crane Critical Habitat Maint. Trust v. F.E.R.C.*, 962 F.2d 27, 34 (D.C. Cir. 1992) (same).

Judge Redden also relied on Judge Magnuson's conclusion that the Corps has complete discretion over the manner in which it operates the Missouri River

dams and reservoirs. Judge Magnuson's order, however, is on appeal to the Eighth Circuit, and Nebraska has asked that Court to reverse the specific conclusion on which Judge Redden relies. Reliance on Judge Magnuson's order in *In re: Operation of the Missouri River System Litigation* is inappropriate at this juncture, given the Eighth Circuit's deliberations and the impending decision of that Court.

In sum, *American Rivers*, for all practical purposes, has been superseded by *In re: Operation of the Missouri River System Litigation*. The former has no continuing legal effect.[9] The latter is on appeal to the Eighth Circuit, and that Court's ruling could undermine significantly Judge Redden's conclusions in the Merits Order. Indeed, the Nebraska Parties have asserted to the Eighth Circuit that NOAA Fisheries' interpretation of the ESA and its implementing regulations is correct. As explained below, to the extent considered by this Court, NOAA Fisheries' FCRPS BiOp should be upheld.

[9] It is of no more effect than, for instance, the conclusion of the Nebraska District Court (subsequently found to be lacking jurisdiction) that the Corps' ESA-related obligations do not override the Corps' responsibilities under the FCA. *See Nebraska v. U.S. Army Corps of Eng'rs*, No. 02-217 (D. Neb.) (Order dated July 23, 2003) ("I conclude that the Corps' Master Manual must be followed, and that it unambiguously places the Corps' interest in the implementation of the 2000 Biological Opinion of the Fish and Wildlife Service subordinate to the Corps' interest in maintaining a minimum navigation flow on the Missouri River.").

V. NOAA FISHERIES CORRECTLY APPLIED THE ESA.

A. The Environmental Baseline by Definition Includes Past and Ongoing Non-Discretionary Actions.

The "environmental baseline" is a term of art found within the definition of "Effects of the action" located at 50 C.F.R. § 402.02, jointly promulgated by NOAA Fisheries and the Service.[10] This regulatory definition states: "***The environmental baseline includes the past and present impacts of all Federal***, State, or private ***actions*** and other human activities ***in the action area***, ..." 50 C.F.R. § 402.02 (emphasis supplied). The baseline includes past and present impacts because they mold the present environmental status quo.

The Service, in the Missouri River context, explained the important function of the environmental baseline:

> The intent of the Section 7 baseline is to capture all those environmental factors that produced the present status of the species in the action area at the time of consultation and to establish the baseline upon which to determine the future effects of the action now under consultation. ... The environmental baseline is an analytical tool used by the Service in Section 7 consultations to determine the incremental difference between the impacts on the current status and condition of Federally listed species and their habitats within the action area "with and without the Federal action."

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[10] *See Interagency Cooperation, Endangered Species Act of 1973, as Amended; Final Rule*, 51 Fed. Reg. 19,926 (June 3, 1986).

Fish and Wildlife Service Position Paper on Endangered Species Act Section 7 Baseline for the Missouri River Master Manual Review and Study. Joint Appendix, *MoRiver Appeals* ("MoRiver J.A."), at 02875.

The effects of a proposed action are measured against the environmental baseline. *See e.g., Northwest Envt'l Advocates v. N.M.F.S.*, 2005 WL 1427696 at *10-11 (W.D. Wash., June 15, 2005). This involves "consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat." *Interagency Cooperation*, 51 Fed. Reg. at 19,932. The Service and NOAA Fisheries determine whether a proposed Federal action will violate Section 7's substantive mandates (e.g., result in "jeopardy") in light of the effect the proposed action will have given the existing environmental baseline. The baseline itself, however, is ***not*** subject to the substantive mandates of Section 7 because it is the result of prior actions. *See generally Northwest Envt'l Advocates,* 2005 WL 1427696.

Any other interpretation of Section 7 results in retroactive application of the ESA to pre-existing (*i.e.*, baseline) activities, including those mandated by

> ... the Service found that the Missouri River had been changed significantly by the construction of the dams and reservoirs, by the Corps' ongoing operations, and by the Corps' projects to aid navigation and stabilize the banks of the river.
>
> ... ...
>
> And by maintaining and increasing flows over the dry summer months to sustain navigation and other downstream river uses, the Corps sometimes flooded tern and plover nests. Those higher flows also increased the level of the river, inundating more sandbars, and reducing the overall amount of habitat for the tern and plover. Higher summer flows also reduced the amount of the slow-moving water habitat that young pallid sturgeon need ... .

Brief of Federal Defendants-Appellees at 15-16 (citations omitted), *MoRiver Appeals*. As the Federal Appellees acknowledged, virtually all of the adverse effects suffered by the Missouri River species were occasioned by the ***construction*** and ***past operation*** of the main stem dams in furtherance of the "dominant" flood control and navigation functions. *ETSI Pipeline,* 484 U.S. at 512.

Similarly, NOAA Fisheries explained the impact of earlier events on the Columbia River species: "[T]he construction of the hydro system has severely degraded habitat in the juvenile migration corridor of this ESU, and the existing structures and facilities result in high levels of mortality for juvenile fish migrating toward the ocean." FCRPS BiOp 8-6; *see also, id.* at 8-9, 8-15, 8-19. Further:

> Development of the [FCRPS], dating to the early twentieth century, has had profound effects on the ecosystems of the Columbia River basin. These effects

> have been especially adverse to the survival of anadromous salmonids. The direct effects of the construction of the FCRPS on salmon and steelhead in the Columbia basin can be divided into four categories: blockage of habitat; alteration of habitat; barrier to, or modification of, juvenile migration; and barrier to, or modification of, adult migration.

FCRPS BiOp 5-19 (internal citations omitted). Finally, NOAA Fisheries explained: "In general, the mainstem and tributary environment for listed species in the Columbia River Basin (CRB) has been dramatically affected by the development and operation of the FCRPS." FCRPS BiOp 5-41.

The adverse effects of dam construction and historic operations on the Columbia and Missouri Rivers form the environmental status quo and resulted in the current status of the species. These historic effects fall within the regulatory definition of the "environmental baseline." 50 C.F.R. § 402.02. NOAA Fisheries must follow the plain language of its own regulatory definition, which has not been challenged as is not directly at issue in this case. *Cf. Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1242 (9th Cir. 2001); *Downer v. U.S. By and Through U.S. Dep't of Agric. and Soil*, 97 F.3d 999, 1008 (8th Cir. 1996); *Exportal Ltda. v. U.S.*, 902 F.2d 45, 46 (D.C. Cir. 1990). Because NOAA Fisheries' interpretation of the "environmental baseline" is consistent with that definition, the FCRPS BiOp should be upheld.

B. NOAA Fisheries Properly Distinguished Between Discretionary and Non-discretionary Elements of the FCRPS When Analyzing the Effects of the Proposed Action.

In the case of the Missouri River, the Service explained its incredible view that:

> [T]he environmental baseline for the Section 7 consultation on the [Missouri River] Master Manual Review and Update study is the existing status and condition of the federally listed species and their habitats in the action area without the impacts of the current operations of the Missouri River dams operated by the Corps, i.e., with ***passive management (run-of-the-river)*** condition reflecting "dams in place, reservoirs full, ***inflow = outflow***."

MoRiver J.A. 02874 (emphasis supplied). Under this run-of-the-river scenario, the Service assumed there were no legal constraints on the Corps' operational authority, and that the Corps exercised total discretion over all dam operations. This is simply wrong as a matter of law.[12] Whether or not Nebraska is correct on this point, however, it is undisputed that the Missouri River biological opinion is based on a hypothetical baseline that assumes the main stem dams are ***inoperative***.

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[12] The Eighth Circuit's holding in *Ubbelohde* limits the Corps' discretion when operating the main stem reservoirs: "We conclude that the Corps's actions are constrained both by the Flood Control Act and by the Master Manual. The Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River. But this discretion is not unconstrained; the Flood Control Act lays out purposes that the Corps is to consider in managing the River. The Flood Control Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system – flood control and navigation." *Ubbelohde,* 330 F.3d at 1027.

In this case, in contrast, NOAA Fisheries properly recognized the absurdity of using a hypothetical baseline that ignores reality. Congress mandated development of the Nation's big rivers to harness their power and control their destructive force. *See, e.g.,* S. DOC. NO. 191, 78th Cong., 2d Sess. (1944) at 10 ("The water of the Missouri River system is a primary national resource which, up to the present time, has been inadequately controlled and developed."). Thus, NOAA Fisheries correctly explained:

> When the consultation is for an ongoing action, the task of assessing the effects of the environmental baseline is complicated by the fact that certain preexisting aspects of the ongoing project are also part of the environmental baseline, while other proposed aspects represent the proposed action that is the subject of the consultation. It is important to recognize a fundamental principle of an ESA § 7(a)(2) consultation. Section 402.03 provides: "Section 7 and the requirements of this part apply to all actions in which there is discretionary involvement or control." ... Thus it follows that the ESA does not require consultation on any elements of the pre-existing project that are beyond the agency's current discretion or control, i.e., anything that is part of the environmental baseline. In addition, the continuing effects of those aspects of the [FCRPS] dams [] that are not subject to Action Agency discretion, such as their existence and operations necessary to satisfy Congressionally mandated purposes (e.g., flood control and irrigation) are considered part of the environmental baseline.

FCRPS BiOp at 5-1.

Critics have long relied on this Court's holding in *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994), to support obliteration of any meaningful

distinction between baseline effects and the effects of a proposed action. In *Pacific Rivers*, this Court upheld a determination that the Forest Service was required to re-initiate consultation on its Land and Resource Management Plans ("LRMP") for two national forests when a new species was listed after adoption of those LRMPs. 30 F.3d at 1051-52. The Forest Service argued that for Section 7 purposes the only "action" occurred when the LRMPs were originally adopted. *Id.* at 1053. This Court disagreed, concluding that adherence to the LRMPs constituted "continuing agency action" requiring consultation. *Id.* at 1051. Absent, however, from *Pacific Rivers* is ***any*** reference to 50 C.F.R. § 402.03, the critically important limitation on the ESA's application at play here. *Pacific Rivers* and its progeny, therefore, do not support the subjection of all ongoing operations to Section 7, regardless of congressional limitations on agency discretion.

By analogy, if Congress in the National Forest Management Act ***required*** the Forest Service to provide in its LRMPs for the logging of one million board-feet of timber per year from national forests, the holding in *Pacific Rivers* would necessarily change. The Forest Service's pre-existing congressional mandate to provide for the harvest of one million board-feet per year, would be non-discretionary and ***not*** subject to the ESA's substantive requirements. *Cf. Department of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-769 (2004) (holding the agency was not required to evaluate the effects of an action under the National

Environmental Policy Act where the agency lacks discretion to refuse to perform the action).[13] The Forest Service still would be required to consult on ongoing, discretionary obligations identified in the LRMP. But, technically, the harvest obligation would be part of the environmental baseline and, by definition, would not be part of the proposed action. 50 C.F.R. § 402.03.

Those relying on *Pacific Rivers* continue to miss a fundamental point in this and related litigation: If ongoing operations are non-discretionary, then Section 7 does not apply to them. 50 C.F.R. § 402.03. For example, in *Ground Zero Ctr.*, 383 F.3d at 1092, this Court held that the Navy need not consult on its location of missile operations "because the Navy lacks the discretion to cease Trident II operations at Bangor for the protection of threatened species." As applied to this case, 50 C.F.R. § 402.03 places within the environmental baseline the Federal agencies' non-discretionary obligation to serve congressionally mandated purposes of the FCRPS. NOAA Fisheries properly recognized this:

> [T]he ESA requires a Federal agency to consult on actions that it proposes to authorize, fund, or carry out that are within its discretionary authority. Conversely, the effects of the existing project that are beyond the current discretion of the action agency are properly part of the effects of the environmental baseline. Those

[13] Notably, the scope of an agency's environmental review obligations under the National Environmental Policy Act are even broader than under the ESA. *See generally Cumulative Impacts Under Section 7 of the Endangered Species Act*, 88 Interior Dec. 903, 1981 WL 143243 (D.O.I. Solicitor's Opinion).

> effects are part of the "no action" environment to which will be added the effects of the proposed action.

FCRPS BiOp at 1-9 (citations omitted).[14] NOAA Fisheries correctly acknowledged:

> Similar to their lack of authority to significantly modify structures, the [Action Agencies] do not have the discretion to abandon some operations. Flood control, navigation and irrigation are examples of Congressionally authorized [FCRPS] project purposes, as is some level of power generation to serve demand. As an example, Congress has not prescribed precisely how the Corps must achieve its flood control responsibilities to protect public safety and property, but it is clear that the Corps is obligated by statutory mandate to provide such a benefit ... . Thus, some aspects of operations like flood control, irrigation, navigation and power generation may be considered part of the environmental baseline.

FCRPS BiOp at 5-5.

The alternative to NOAA Fisheries' formulation of the environmental baseline is the Service's nonsensical "run-of-the river" construct applied on the Missouri River. The Service correctly characterized this as a "simplistic approach"

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[14] The district court afforded "limited deference" to NOAA Fisheries' interpretation of 50 C.F.R. § 402.03, concluding that interpretation represents a change in the agency's position. *See* Merits Order, 2005 WL 1278878 at *11. However, the level of deference due is irrelevant when a regulation is unambiguous. *See Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 790 (9th Cir. 2004). Courts and agencies must give effect to an unambiguous regulation. *Compare Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Section 402.03 unambiguously states that Section 7 only applies to an action where there is "discretionary Federal involvement or control." 50 C.F.R. § 402.03.

that equates the effects of the environmental baseline with the effects of the proposed action. MoRiver J.A. 10044 (explaining the Service accepts "an assumption that the environmental conditions that would result from continued operations of the system will be at the same 'level' as the current environmental baseline."). The practical effect of this "approach" in the Missouri River context was to attribute to the Corps' proposed future operations (many of which were designed expressly to benefit listed species) all of the adverse impacts that occurred on the Missouri River system between 1937 (when the first dam closed) and 2000 (the date of the original biological opinion). The Service's attribution of "past and present" adverse effects (i.e., the baseline conditions) to the proposed action destroyed any distinction between the "environmental baseline" and the proposed action. *Id.* (identifying "future with project" as existing operations). The Service contended that such an assumption was necessary because the Service could not distinguish between past, present and future adverse effects. *Id.* However, NOAA Fisheries correctly drew such a distinction in the case at bar, and NOAA Fisheries' methodology, which comports with the regulations governing interagency consultation, should be upheld.

NOAA Fisheries' methodology is not only lawful, it is absolutely necessary if federal water management agencies are to observe their congressional mandates to operate for project purposes while meeting their ESA obligations. This Court

recognized the importance of reading such mandates *in pari materia* in *National Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163 (9th Cir. 2004). The Court there explained that the Clean Water Act must be reconciled with the Corps' mandatory obligations under the River and Harbor Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10 (1945). The Court stated:

> Applying this reasoning, a more sensible interpretation of the CWA is that ***discretionary*** operations of the dams, consistent with the statutory regime established by Congress, should comply with state water law standards.

Id. at 1178 (emphasis supplied). In upholding the Corps' rejection of a "natural river operation" method advanced by the plaintiffs, the Court explained such a method "would have essentially negated the water impoundment function of the dams, ..." *Id.* at 1173.

As in *National Wildlife Fed'n*, the ESA must be read *in pari materia* with the agencies' obligations under the FCRPS. The agencies must comply with the ESA without "essentially negating" the functions of the FCRPS. NOAA Fisheries' formulation of the "environmental baseline" and application of 50 C.F.R. § 402.03 is the only logical way to reconcile the agencies' competing mandates.

VI. CONCLUSION.

This Court should reverse the Injunction issued below because it is the product of an abuse of the district court's discretion under the APA. In so doing, this Court should not need to reach the Merits Order. If the Court does reach the

Merits Order, however, it should conclude that NOAA Fisheries' actions are lawful and that the Merits Order should be reversed.

Respectfully submitted this 30th day of June, 2005.

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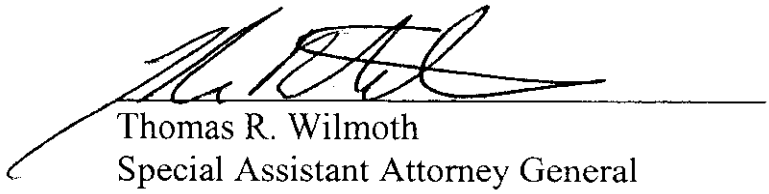

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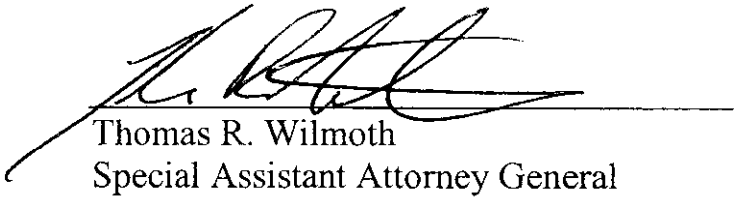
CERTIFICATE OF COMPLIANCE

In accordance with FED. R. APP. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the requirements of FED. R. APP. P. 29(d) and 32(a)(7)(B), in that it is set in a 14-point proportionally spaced typeface and contains no more than 7,000 words, including headings, footnotes and quotations.

The undersigned has relied upon the word count function of Microsoft® Word 2003, the word-processing system used to prepare this brief. According to that word count, this brief contains 6,800 or fewer words.



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COURT OF APPEALS
FOR THE NINTH CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NATIONAL WILDLIFE FEDERATION, *et al.*,	)	Case Nos. 05-35569 and 05-35570
Plaintiffs-Appellees,	)	**CERTIFICATE**
v.	)	**OF SERVICE**
NATIONAL MARINE FISHERIES SERVICE, *et al.*,	)	
Defendants,	)	
And	)	
FRANKLIN COUNTY FARM BUREAU FEDERATION, *et al.*,	)	
Defendants-Intervenors,	)	

The undersigned hereby certifies that the original and fifteen copies of **BRIEF OF *AMICUS CURIAE* STATE OF NEBRASKA IN SUPPORT OF THE FEDERAL DEFENDANTS' AND THE BPA CUSTOMER GROUP'S APPEALS TO REVERSE THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT** were sent to the Clerk of the United States Court of Appeals for the Ninth Circuit via Federal Express this 30th day of June, 2005. The undersigned further certifies that two true and correct copies of said brief were served upon each of the following via first class mail, postage

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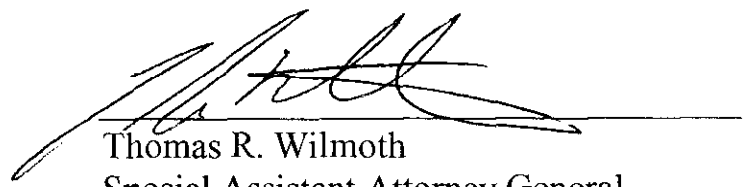

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